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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 417

ARTHUR A. YURDIN, BEATRICE W. YURDIN, IRVING S. MOORIN and PHYLLIS MOORIN,
Petitioners,

vs.

TOWN PLAN AND ZONING COMMISSION OF THE TOWN OF FAIRFIELD and TURNPIKE ASSOCIATES, INC.,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.

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Petition for Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioners, Arthur A. Yurdin, Beatrice W. Yurdin, Irving S. Moorin and Phyllis Moorin, pray that a writ of Certiorari issue to review the judgment of the Supreme Court of Errors of the State of Connecticut, rendered in this cause on July 8, 1958.

I.

Opinion Below.

The opinion of the Court of Common Pleas for the County of Fairfield, is found in the record, page 5.

The opinion of the Supreme Court of Errors of the State of Connecticut is reproduced in the Appendix at page 18a. This opinion is reported at 145 Conn. 416.

II.

Statement of the Case.

On August 20, 1956, the Respondent, Turnpike Associates, Inc., filed a petition with the Town Plan and Zoning Commission of the Town of Fairfield, requesting a change of zone of certain property located on Black Rock Turnpike, in the Town of Fairfield, State of Connecticut. Thereafter, the Respondent, Town Plan and Zoning Commission, on its own motion, proposed the change of zone of an area located on Black Rock Turnpike, larger than the parcel owned by the Respondent, Turnpike Associates, Inc., and including this parcel within the dimensions of the larger area. On September 19, 1956, pursuant to publication and notice, a public hearing was held by the Respondent, Town Plan and Zoning Commission, on both the application of the Respondent, Turnpike Associates, Inc., and the proposal of the Commission itself.

This hearing was held pursuant to the provisions

of Section 375d of the 1955 Supplement to the General Statutes of the State of Connecticut, more specifically set out in the Appendix hereto at page 14a.

Both the Petitioners and the Respondent, Turnpike Associates, Inc., presented evidence and arguments at this public hearing. On September 26, 1956, the Respondent, Town Plan and Zoning Commission, held an executive session at which attendance by the public was foreclosed. At this executive session, the Commission received and considered certain additional evidence, exhibits and testimony not referred to or introduced at the public hearing. The testimony was given by Mr. Robert S. Bryan, the Planning Director of the Town of Fairfield, and Mr. James Lee, the Town Planning Technician, neither of whom was a member of the Commission. Among the evidence and exhibits considered for the first time at this closed meeting were the following:

Exhibit 26—Report #7 on population.

Exhibit 27—Report #9 on industry.

Exhibit 30—Town map of commercial zones and institutional land.

Exhibit 31—U. S. G. S. map of metropolitan area.

Exhibit 33—Map of areas in existing and potential development study.

Exhibit 36—Study of business land areas on Black Rock Turnpike.

Exhibit 38—Mounted master plan map of dwelling unit distribution.

Exhibit 41—Three rough sketches of possible relocation of Black Rock Turnpike.

Exhibit 42—Sketch of development possible on existing 200 foot depth.

Exhibit 43—Table of areas of Fairfield zones.

See Appendix, page 1a-14a. The testimony of Bryan and Lee is set forth more fully in the Appendix, pages 1a, 2a, 3a, 4a. No opportunity was afforded the Petitioners to know the nature of the evidence, arguments and opinions thus presented, nor to meet the same, nor to cross-examine the offerors of such opinions.

After receiving and considering said evidence, exhibits and testimony in executive session, the Commission adopted the change of zone proposed by the Commission. An appeal from the decision of the Commission was then taken by the Petitioners to the Court of Common Pleas for Fairfield County by writ, summons and complaint dated October 8, 1956. A copy of this complaint and responsive pleadings directed thereto are found in the Record, pages 1-5.

Acting pursuant to Section 379d of the 1955 Supplement to the General Statutes of the State of Connecticut, (see Appendix page 16a) the Respondent, Town Plan and Zoning Commission, returned all of the evidence considered by it in reaching its decision to the Court of Common Pleas. Such return constituted the record in the case. Included in this evidence were the exhibits hereinbefore noted. On the hearing of the appeal, the attorney for the Respondent introduced each of 43 separate items contained in the return, many of which, admittedly,

were not in evidence at the public hearing. (See Appendix, page 6a.) It also appeared for the first time at the hearing of the appeal, that the Commission had consulted the witnesses above-mentioned in the executive session.

Objections and exceptions to the introduction of this evidence were made promptly and noted in the Record. (See Appendix, page 9a.) The Petitioners cited Article 14, Section 1, of the Constitution of the United States, and claimed that they had been denied a fair hearing, in that the Commission had improperly received and considered the evidence referred to above. This claim was overruled by the Trial Court and judgment was entered sustaining the decision of the Commission, and dismissing the appeal of the Petitioners therefrom on March 13, 1957. See Record, page 5.

The Petitioners then took an appeal to the Supreme Court of Errors of the State of Connecticut, relying in part upon the constitutional question described above. See Record, pages 11, 14. In the argument of this case in the Supreme Court of Errors, the Petitioners pursued this question in detail. See Appendix, page 22a. The Supreme Court of Errors of the State of Connecticut sustained the decision of the Court of Common Pleas.

No petition for rehearing in the Supreme Court of Errors of the State of Connecticut was filed.

III.

Jurisdiction.

The judgment of the Supreme Court of Errors of the State of Connecticut was entered on July 8, 1958, and rehearing was not sought. The judgment of the Supreme Court of Errors of the State of Connecticut, dated July 8, 1958, in this cause was a final judgment of the highest court of the State in which a decision in this case could be had. There was especially claimed under the Constitution of the United States, a title, right, privilege or immunity. The stage in the proceedings in the Court of Common Pleas for Fairfield County, the Trial Court, at which, and the manner in which, the federal question sought to be reviewed, was raised, is as follows:

At the hearing of the appeal before the Court of Common Pleas, when counsel for the Respondent, Town Plan and Zoning Commission, sought to introduce certain evidence not presented at the public hearing of the Commission, timely objection was made. The Petitioners specifically referred to Article 14, Section 1, of the United States Constitution, as forming the basis of this objection. See Appendix, page 14a.

The stage in the proceedings in the Supreme Court of Errors at which, and the manner in which, the federal question sought to be reviewed, was raised, is as follows:

The Petitioners pursued the federal question by assigning it as error of the Court of Common Pleas and by brief and oral argument before the Supreme

Court of Errors of the State of Connecticut. See Record, page 12.

The Court of Common Pleas refused to consider the federal question presented. See Memorandum of Decision, Record, page 5. The Supreme Court of Errors rejected it as a ground for overruling the judgment of the Court of Common Pleas. See decision of Supreme Court of Errors, Appendix, page 18a.

IV.

Questions Presented.

The questions presented herein are:

1. Was the reception and consideration of evidence by the Respondent, Town Plan and Zoning Commission, in executive session, without affording the Petitioners an opportunity to meet and rebut such evidence, and to cross-examine the offerors thereof, a denial of Petitioners' right to a fair hearing as guaranteed by Article 14, Section 1, of the Constitution of the United States?

2. If the proceedings conducted herein by the Respondent, Town Plan and Zoning Commission, complied with Section 375d of the 1955 Supplement to the General Statutes of the State of Connecticut, does this statute then violate Article 14, Section 1, of the United States Constitution, in that the Petitioners were thereby deprived of their property without due process of law?

V.

Reasons for Granting Writ.

The Respondent, Town Plan and Zoning Commission, conducted a closed meeting some seven days after the public hearing at which only members of the Commission, the Town Planning Director and the Town Planning Technician were present. Considerable time was there devoted to the consideration of reports on population and industry; maps of commercial zones and institutional land; of potential development areas; of business land areas on Black Rock Turnpike; of unit distribution; and of rough sketches of possible relocations of Black Rock Turnpike. See Appendix, pages 1a-5a. In addition, the Town Planning Director and the Town Planning Technician explained and discussed various aspects of these exhibits. See Appendix, pages 1a-5a. That these maps, studies and testimony weighed heavily in the decision made by the Commission, is shown both in the Minutes of the executive session (see Appendix, pages 1a-5a) and in the Commission's reasons for its decision. See Record, page 4. None of these exhibits was presented, discussed, or explained at the public hearing on September 19, 1956; none had been officially adopted by the Commission prior to the executive session of September 26, 1956; and although both the Town Planning Director and the Town Planning Technician were present at the public hearing, neither was called upon to testify there. Thus, although these exhibits and testimony became a part of the record, the Petitioners, as owners of property adjacent to and nearby the land thus rezoned, were never given the opportunity of

rebutting the material, of cross-examining its authors, or of even knowing what the Commission was considering, until such evidence came forth at the hearing of the appeal in the Court of Common Pleas."

Connecticut courts have long held that an interested party at a public hearing is entitled to learn what evidence the commission was considering. **Jennings vs. Conn. Light & Power Co.**, 140 Conn. 650; 103 A. 2d 535 (1954).

In **Wadell vs. Board of Zoning Appeals**, 136 Conn. 1; 68 A. 2d 152 (1949) the Court stated:

> "A denial of a right to cross-examine may easily lead to the acceptance of testimony at its face value, when its lack of credibility or the necessity for accepting it only with qualifications can be shown only by cross-examination."

Likewise, in **Parsons vs. Board of Zoning Appeals**, 140 Conn. 290 at 293, 99 A. 2d 149 (1953) the Court stated that the parties were entitled as a right "to be fairly apprised of the facts upon which the board is asked to act."

It might be argued that the present case involves a quasi-legislative hearing as distinguished from an administrative hearing, and that the procedural safeguards required in administrative hearings are not applicable. However, the Supreme Court of Errors of the State of Connecticut has recognized that the activities of a Plan and Zoning Commission cannot be categorized into convenient pigeon holes. "The modification of zoning regulations partakes of the

nature of a legislative proceeding; nevertheless, it is not legislative in the broad sense, on the contrary the power emanates from a specific grant and the manner of its exercise is limited. The mode of exercising the power thus expressly granted must be reasonable. The exercise of power of that nature, whether it be denominated, legislative, or quasi-judicial, should command the highest public confidence . . . " **Mills vs. Town Plan and Zoning Commissibn of the Town of Windsor,** 144 Conn. 493; 134 A. 2d 250 (1957). Likewise, in the case of **Beach vs. Planning and Zoning Commission of the Town of Milford,** 141 Conn. 79; 103 A. 2d 814 (1954) the Court recognized that such a Commission acts in an administrative rather than a legislative capacity in exercising its function of approving subdivision plans.

Thus, we see that a commission of this type is capable of acting in a legislative, quasi-legislative, quasi-judicial or administrative capacity.

It is the contention of the Petitioners that if this same proposal were brought before the Zoning Board of Appeals, the same end results could have been accomplished by obtaining a waiver of zoning requirements. In that event, there could be no question but that the Zoning Board of Appeals would be acting in an administrative capacity and that the Petitioners would have been entitled to have been apprised of all of the evidence which such a board received and considered.

Slagle vs. Zoning Board of Appeals, 144 Conn. 690; — A. 2d — (1957).

Wadell vs. Board of Zoning Appeals, supra.

It would certainly seem less than just that the Respondent, Turnpike Associates, Inc., merely by choosing the forum before which it presented its proposal, could deprive the neighboring property owners of their rights to a full hearing in the due process connotation of the word.

Mrowka vs. Board of Zoning Appeals, 134 Conn. 149 at 154; 55 A. 2d 909 (1954).

Parsons vs. Board of Zoning Appeals, supra.

It is of particular importance to note that the Commission in this instance occupied the unique position of proponent, judge and witness, all simultaneously, and therefore should have been most scrupulous in exercising the safeguards due the Petitioners in this case.

The premise above stated has been so firmly implanted in Anglo-American jurisprudence as to remove all doubts of its applicability to administrative or quasi-judicial proceedings, as in the case at hand. As stated by Frankfurter, J., in **Federal Communications Commission vs. Pottsville Broadcasting Co.**, 309 U.S. 134, S. Ct. 437, 84 L. Ed. 656 (1940), "Procedure of administrative trials must observe the fundamentals of fair play, which require the interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion." Further, in **Shields vs. Utah, Idaho Railway Co.**, 305 U.S. 177, 59 S. Ct., 160, 83 L. Ed. 101 (1938), the Court, by Hughes, C. J., stated, "The parties affected by the determination of an administrative body are entitled to insist on compliance with the requirements of due process." These "re-

quirements of due process" and the "fundamentals of fair play" denied the Petitioners by the Respondent, Town Plan and Zoning Commission of the Town of Fairfield, are more specifically set forth in the following cases:

Ohio Bell Telephone Co. vs. Ohio P. U. C., 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1936),

in which plaintiff reversed the decision of the Ohio Supreme Court and the P. U. C., decreeing a refund to subscribers. The commission had taken notice of general price trends in the area at executive session without giving the plaintiff an opportunity to explain or rebut them. The opinion, by Cardozo, J., bases the reversal on the denial of an opportunity to introduce new evidence or rebut old on appeal, as well as the denial to plaintiff of the opportunity of cross-examining at the hearing. Note the striking similarity to the case at hand, wherein Petitioners first became aware of the Commission's use of extraneous material in the hearing of the appeal before the Court of Common Pleas. Cardozo, in the **Ohio Bell** case, states, "It is a denial of the fundamentals of a trial when a commission reaches a decision on evidential facts not spread upon the record and upon information secretly collected and not disclosed which the party complaining had had no opportunity to examine or analyze, explain or rebut."

These basic tenets of procedural due process—that nothing can be treated as evidence which is not introduced as such—that administrative officers who are required to make a determination after a hearing, in the exercise of judicial or quasi-judicial functions, cannot act on their own information as could

jurors in primitive days, but must fully apprise all parties of the evidence submitted or to be considered —and that a hearing which precedes the taking of property is not a mere form, but should give opposing parties a right and opportunity by brief and argument to controvert the claims asserted against it before a tribunal bound to listen and give legal effect to what has been established, are so firmly ingrained in our law as to be a corner stone of our jurisprudential structure.

Baltimore & Ohio R. Co. vs. U. S., 264 U.S. 588; 44 S. Ct. 317, 68 L. Ed. 667 (1924).

U. S. vs. Abilene & S. R. Co., 265 U.S. 274, 44 S. Ct. 565, 68 L. Ed. 1016 (1925).

Crowell vs. Benson, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932).

Morgan vs. U. S., 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936).

I. C. C. vs. Louisville & N. R. Co., 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1912).

Wash. ex. rel. Oregon R. & Nav. Co. vs. Fairchild, 224 U.S. 510, 32 S. Ct. 535, 57 L. Ed. 431 (1910).

18 ALR 2d ANNO. 552, at 555.

There can be no question in the light of the facts stated above that the constitutional safeguards provided to protect the individual from the steam roller tactics used by the Respondent, Town Plan and Zoning Commission, herein were observed primarily in the breach. The immediate and direct relevance of the above cited cases to the instant case is at once

obvious and shocking. The explicit directives of this Court are at odds with the actions of the Respondent, Town Plan and Zoning Commission.

If, as the Supreme Court of Errors of the State of Connecticut, states in its opinion, "The Commission did not exceed its authority or violate any rights of the plaintiffs when it heard the reports and population maps explained by the trained personnel who prepared them for the Commission," (see Appendix, page 22a) then it is the contention of the Petitioners that Section 375d of the 1955 Supplement of the General Statutes of Connecticut, as interpreted by that Court, is blatantly unconstitutional. Section 375d requires " A public hearing . . . at which parties in interest and citizens shall have an opportunity to be heard." Such a public hearing cannot be merely form. **Couch vs. Zoning Commission of the Town of Washington,** 141 Conn. 349; 106 A. 2d 173 (1954). The word "hearing," as used in this section, must mean a hearing in the due process connotation of the word requiring notice, an opportunity to be present, and an opportunity to note and meet the evidence presented.

Counsel for Respondent, Town Plan and Zoning Commission, admitted that the Commission committed the acts and omissions complained of above at the hearing of the appeal in the Court of Common Pleas. See Appendix, page 7a. The issue then is whether the legislature has the power to deprive citizens of their property without the safeguards required and guaranteed by Article 14, Section 1, of the Constitution. In other words, the Petitioners contend that they have been deprived of a valuable

property right, in that land adjacent to and nearby their homes has been rezoned from residential to business, thereby decreasing the value of their property. The rezoning took place as the result of a decision by the Zoning Commission, based substantially upon evidence received by it in executive and closed session. The Petitioners had no opportunity to know or to rebut this evidence. The Connecticut statute referred to above requires that a public hearing be held, and it is submitted that the type of hearing conducted in the instant case is by no stretch of the imagination a public hearing in the constitutional sense of a hearing, with the attributes of due process.

> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the commission had before it extraneous, unknown but presumptively sufficient information to support the finding." **Interstate Commerce Commission vs. Louisville & Nashville R. Co.**, 227 U.S. 88, 93; 88 S. Ct. 185 (1913); **Jaffe vs. State Department of Health**, 135 Conn. 339; 64 A. 2d 330 (1949); **Wadell vs. Board of Zoning Appeals**, 136 Conn. 1; 68 A. 2d 152 (1949).

If the hearing provided for by the Connecticut

legislature in Section 375d need not meet the standards required by the Constitution, it is the Petitioners' contention that such a hearing would at once be illegal, shocking and repugnant to the United States Constitution. The Petitioners submit that such an interpretation and application of this statute violates their right to a fair hearing under Article 14, Section 1, of the United States Constitution.

The Petitioners present to this Court and attach herewith, as an exhibit hereof, the duly certified transcript of this case as the same appears in the Supreme Court of Errors of the State of Connecticut.

VI.

Conclusion.

WHEREFORE, the Petitioners pray that a Writ of Certiorari issue to the Supreme Court of Errors of the State of Connecticut for the reasons stated.

Dated at Bridgeport, this 30 day of Sept. A.D. 1958.

Respectfully submitted,

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